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**Supreme Court of the United States**

**OCTOBER TERM, 1951**

**No. 8**

**IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,  
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE  
TIGER and EDITH TIGER,**

*Appellants,*

*against*

**THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,**

*Appellee.*

**APPELLANTS' REPLY BRIEF**

**ARTHUR GARFIELD HAYS,  
OSMOND K. FRAENKEL,**  
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## APPELLANTS' REPLY BRIEF

We shall attempt briefly to deal here with the various points made by the Attorney General of the State of New York in his brief *amicus curiae*,\* as well as with the arguments of appellee.

1. On the basic constitutional issue there seems to be a complete misunderstanding of appellants' position. Feeling bound by *Garner v. Los Angeles Board*, 341 U. S. 716, we are, of course, not arguing that a state may not disqualify from public employment persons who advocate the overthrow of the government by force or belong to organizations knowing that these so advocate. Irrelevant, therefore, is all discussion concerning the need for "fidelity" (A. G. pp. 25-32). We are not, however, resting our primary attack on the Feinberg Law on procedural grounds only (as suggested by appellee, p. 20). Important as these are to the individuals who may be affected by the law, our challenge under the First Amendment (as read into

\* References will be (A. G. p. \_\_\_\_).

The opinion of the Court of Appeals was written by Judge LEWIS and is reported in 301 N. Y. 476 (R. 54). In the Appellate Division, Second Department, the opinion was written by Mr. Justice CARSWELL. It is reported in 276 App. Div. 527 (R. 50). The opinion written by Mr. Justice HEARN at Special Term of the Supreme Court, Kings County, is reported in 196 Misc. 873 (R. 35).

As a result of the dismissal of the complaint as to certain of the plaintiffs at Special Term of the Supreme Court, the caption of this case, originally *Lederman et al. v. Board of Education of the City of New York*, is now *Adler et al. v. Board of Education of the City of New York*.\*

The New York Court of Appeals, when deciding the instant case, simultaneously and in the same opinion disposed of appeals in two other cases in which the validity of the Feinberg law was unsuccessfully challenged, *Thompson v. Wallin* and *L'Hommedieu v. Board of Regents* (301 N. Y. 476; Record, p. 54).

### Statement of Jurisdiction.

Plaintiffs-appellants have brought this case before this Court under Title 28 U.S.C. § 1257, as an appeal from a final judgment of the highest court of a State rejecting an attack on a State statute claimed to be in conflict with the Federal Constitution. The decision of the Court of Appeals was rendered on November 30, 1950 (54). This appeal was allowed by the Chief Judge of the Court of Appeals on January 17, 1951 (72). On June 4, 1951, this Court noted probable jurisdiction (75).

### Statement of the Case.

The defendant-appellee deems it necessary to correct a portion of plaintiffs-appellants' statement of the case in which they set forth what defendant-appellee regards as an inaccurate and altogether incomplete summary of the

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\* The Court held on the authority of *United Public Workers v. Mitchell*, 330 U. S. 75 (1947), that the plaintiffs who sued as teachers had no standing to challenge the Feinberg law in the absence of any official action applying the statute against them individually, but ruled that the plaintiffs who sued as taxpayers had standing to attack the Law under Section 51 of the New York General Municipal Law.

Feinberg law and of the interpretation given to it by the New York Court of Appeals. This summary appears in the final paragraph of the statement of the case in the brief of plaintiffs-appellants (p. 3).

Such summary omits to state that the Court of Appeals construed the Feinberg law as authorizing the Board of Regents to promulgate lists of organizations advocating the overthrow of the government by force or unlawful means, only after notice and a hearing accorded to such organizations, with a full right on the part of such organizations to judicial review of the determination of the Board of Regents.

Such summary states that the Feinberg law, as interpreted by the Court of Appeals, makes proof of membership by a teacher\* in an organization so listed *prima facie* evidence of disqualification. Such summary omits to state however: (1) that this rule of *prima facie* proof goes into operation only where membership in a listed organization is retained by the teacher more than ten days after the promulgation of the list; and (2) that while proof of membership thus retained in a listed organization *prima facie* establishes that the organization advocates overthrow of the government by force or unlawful means and that the accused teacher knows this, the Feinberg law nevertheless requires (a) that the teacher be accorded a hearing at which he must be permitted an opportunity to offer contradictory evidence, and (b) that if substantial contradictory evidence is presented, the educational authorities must meet the burden of proving the nature of the organization and the teacher's knowledge thereof, by direct proof and by a fair preponderance of the evidence. Likewise omitted from the summary is any mention of the unquestioned statutory right of teachers to judicial or administrative review of a determination of disqualification, at their election.

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\*The Feinberg law applies to "superintendents of schools, teachers or employees in the public schools in any city or school district of the state" (New York Education Law § 3022, subdivision 1; see Appendix A of this brief). In the interest of brevity, and since the vast majority of persons to whom the law applies are teachers, such persons will be hereinafter referred to as teachers.

## **The Feinberg Law, as Construed by the Highest Court of New York State.**

The purpose of the Feinberg law is to implement two earlier statutes which provide in effect that teachers who advocate the overthrow of the government by force, violence or unlawful means, or who knowingly hold membership in organizations advocating such action, shall, after appropriate proceedings (including notice and hearing), be removed from the public school system. One of these earlier statutes is likewise designed to prevent persons engaging in such conduct from being appointed as teachers in the public schools.

### **1. The Statutes Implemented.**

The substance of these earlier laws is as follows:

#### **a. § 12-a of the Civil Service Law.**

By the 1939 Laws of New York State, Chapter 547, the Legislature added to the New York Civil Service Law, § 12-a\* (printed in Appendix A of this brief, pp. 45-46), which, as interpreted by the highest New York Court, provides in substance that no person shall be appointed to or retained in any position in the State civil service or in the public educational system who wilfully advocates the overthrow of the government by force, violence or unlawful means, or who holds membership in an organization advocating such action, with knowledge of such advocacy by the organization. The Court of Appeals, in defining the kind of membership which disqualifies under § 12-a of the Civil Service Law and the Feinberg law, explicitly limited the disqualification to one who "knowingly holds membership" in an organization having such illegal objectives (*Thompson v. Wallin*, 301 N. Y. at p. 494; Record, p. 67). It is clear, therefore, that as far as § 12-a of the Civil Service Law, as implemented by the Feinberg Law, provides for disqualification based on membership in an organization, such disqualification is

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\* Last amended by New York Laws of 1940, Chapter 564.

limited to cases where the teacher involved holds membership in the group with knowledge of its advocacy of violent or illegal overthrow of the government. In the decision of the Appellate Division in this case, the Court declared (276 App. Div. at p. 530; Record pp. 52-53):

"The disqualification referred to in subdivision (c) of section 12-a, in respect to membership by an employee in a described organization means with knowledge of the employee of its subversive character."

Subdivision d of § 12-a expressly provides that any person ruled ineligible for public employment under such section or dismissed thereunder, may obtain judicial review of such determination. The provisions of subdivision d are as follows:

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

Other provisions of law, which must be read with § 12-a, guarantee that no teacher may be removed from his position on the grounds specified in that section without prior notice and hearing. These provisions of law are discussed *infra*, pp. 14-15 of this brief.

#### **b. § 3021 of the Education Law.**

By New York Laws of 1917, Chapter 416, the Legislature added to the State Education Law, § 3021 (formerly § 568), which provides in substance that any "person employed as

superintendent of schools, teacher or employee in the public schools" who utters treasonable or seditious words or commits a treasonable or seditious act while in such service, shall be removed from his position in the public school system. The text of § 3021 is printed in Appendix A of this brief, p. 45.

As in the case of § 12-a of the Civil Service Law, no dismissal may be ordered under § 3021 without prior notice and hearing in the manner explained *infra*, pp. 14-15.

## **II. The Implementing Statute (the Feinberg Law), the Regulations Promulgated by the Board of Regents Thereunder and the Interpretive Memorandum of the State Commissioner of Education:**

### **a. The legislative findings set forth in the preamble of the Feinberg Law.**

In 1949 the New York State Legislature determined that by reason of conditions which it found to exist in the public educational system, it was necessary to provide legislative means for the effectuation of the provisions of § 12-a of the Civil Service Law and § 3021 of the Education Law. For this purpose, the Legislature enacted the Feinberg law.

The first section of the Act consists of a legislative declaration embodying the findings of the Legislature as to the conditions necessitating the enactment of the statute. The Legislature found that despite the protective statutes described above, members of subversive groups advocating violent overthrow of the government, including members of the Communist Party and its affiliated organizations, had infiltrated into the personnel of the public school system. It was found as a matter of legislative determination that members of such groups frequently use their official positions to advocate and teach the doctrines of such groups; that such members are frequently bound by oath or agreement to follow and teach a prescribed party line or group dogma without regard to truth or free inquiry; that the result of the infiltration of such persons into the public educational system is that the propaganda of such

groups can be disseminated among children of tender years by teachers to whom they look for guidance, authority and leadership; that such propagandizing of pupils may be and frequently is sufficiently subtle to escape detection in the classroom; that it is therefore difficult to measure the menace of the infiltration of such persons into the public school system; that such infiltration was not prevented previously and threatens in a dangerous manner to become a commonplace in the schools; and that in order to combat this grave menace it is essential that a policy of rigorous enforcement be observed in carrying out the above-described laws which forbid the appointment to or retention in the public educational system of persons who are members of organizations advocating violence and illegal conduct, such as the Communist Party and its affiliated organizations. Accordingly, the Legislature found that the Board of Regents, the administrative body which heads the New York State educational system (McKinney's Education Law, §§ 201-216), should be directed to take affirmative action for the enforcement of such protective laws in the manner prescribed by the remaining portions of the Feinberg law, which are described *infra*.

The word "subversive" is used in the preamble of the Feinberg law as a descriptive term limited to organizations which advocate the overthrow of the government by force or illegal means. This term is likewise used in the preamble for the purpose of labeling such doctrine of violent overthrow. However, the remainder of the Act, which contains its operational provisions, mentions the word "subversive" only once (except for the inclusion of the term in the heading of § 3022 of the Education Law), and then defines the term as applying only to organizations which advocate the overthrow of the government by force or unlawful means, as described in § 12-a of the Civil Service Law. While the preamble refers to the Communist Party and its affiliated organizations, such allusions are for the purpose of illustrating the kind of organization believed to come within the prohibitions of § 12-a of the Civil Service Law.

In any event, the preamble cannot be treated as a determination of the organizations or persons subject to or affected by the provisions of the Feinberg Law, or § 12-a of the Civil Service Law, or § 3021 of the Education Law, for the New York Court of Appeals so held in this case in the following language (301 N. Y. at p. 493, Record, p. 66):

“ . . . the preamble of the Feinberg Law . . . is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law.”

- b. Provisions of the Feinberg Law prescribing action to be taken by the Board of Regents for the purpose of enforcing Civil Service Law, § 12-a and Education Law, § 3021.

The operational portion of the Feinberg Law is contained in a new § 3022 which it adds to the Education Law.

#### 1. Preparation of list of organizations.

Subdivision 1 of § 3022 directs the Board of Regents to promulgate and enforce rules for the disqualification and removal of persons who are ineligible for appointment to or retention in positions as teachers under § 12-a of the Civil Service Law or § 3021 of the Education Law. Such rules are required to specify appropriate methods and procedure for the enforcement of these statutes.

Subdivision 2 of § 3022, as interpreted by the New York Court of Appeals, provides that the Board of Regents, after inquiry, notice and hearing, shall prepare a list of organizations which it finds to be subversive “in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set

forth in section twelve-a of the civil service law." The Board of Regents is authorized to amend and revise the list from time to time. In making its inquiries, the Board may utilize similar lists promulgated by any Federal authorities authorized to do so by Federal Law, regulation or executive order, and the Board may receive any supporting evidence or material from the Federal authorities which they may make available to it.

The New York Court of Appeals has made it clear that, regardless of any Federal listings or receipt of evidence from the Federal authorities, the Board of Regents may not place the name of any organization on its list unless, after notice to the organization and a hearing, it finds that such organization presently advocates the overthrow of the government by force or unlawful means. In this connection the Court of Appeals declared (301 N. Y. at p. 493; Record p. 66):

"Furthermore, a textual examination of the provisions of the Feinberg Law—section 3022—discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry."

Again, in the same passage of its opinion, the Court of Appeals refers to an organization placed on the list as "any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means."

In further affirmation of the right of any organization to notice and a hearing conducted by the Board of Regents, in advance of a determination by the Board as to whether its name shall be placed on the list, the Court stated (301 N. Y. at pp. 493-494; Record, p. 66):

"... subdivision 2 of section 3022 directs the Board of Regents, after inquiry, notice and hearing,

to list 'organizations which it finds to be subversive in that they advocate \* \* \* that the government \* \* \* shall be overthrown or overturned by force, violence or any unlawful means' \* \* \*."

Moreover, the Court of Appeals stated in equally positive terms that any organization named in such list has a right to judicial review of the determination of the Board of Regents including it among the listed groups. As to this point, the Court of Appeals said (301 N. Y. at p. 493; Record, p. 66):

"In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act."

In *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), Mr. Justice FRANKFURTER noted in his concurring opinion that the Feinberg Law "makes notice and hearing prerequisite to designation of organizations" (p. 173, n. 20) and Mr. Justice JACKSON likewise made reference to this fact in his concurring opinion (p. 186).

Under the procedure of the Board of Regents, hearings on the listing of organizations are public, and the transcript of the evidence taken at the hearing is a public record (New York Public Officers Law, Section 66). Any person against whom charges are preferred pursuant to the Feinberg law, or his attorney, may examine a transcript of such evidence.

2. Issuance of rule that membership in listed organization is *prima facie* evidence of disqualification under § 12-a of the Civil Service Law for service in the public school system.

Subdivision 2 of § 3022 of the Education Law requires the Board of Regents to include in the regulations promulgated by it under that section, provisions making membership in any organization listed by the Board *prima facie* evidence of disqualification for appointment to or retention in any position in the public schools of the State.

In accordance with this direction, the Board of Regents has included provisions to that effect in subdivision 2 of § 254 of the Rules of the Board of Regents adopted on July 15, 1949, pursuant to the Feinberg law. Section 254 is set forth in Appendix A of this brief, pp. 47-50.

The Court of Appeals has construed this provision of the Feinberg law to mean that proof of the membership of a teacher in a listed organization, establishes *prima facie* the two elements of disqualification under § 12-a of the Civil Service Law, namely: (1) that the organization is one advocating violent overthrow; (2) that the accused teacher knows it to be such. Thus, the Court of Appeals said (301 N. Y. at p. 494; Record, p. 67):

"The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in any organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment."

But the Court of Appeals also held that implicit in this presumption is the requirement of a hearing at which the accused is given an opportunity to present substantial evidence tending to overcome such *prima facie* evidence of the nature of the organization and of the accused's knowledge thereof. As to the requirement of a hearing, the Court said (301 N. Y. at p. 494; Record, p. 67):

"Thus the phrase '*prima facie* evidence of disqualification', as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision."

Moreover, the Court of Appeals likewise made it clear that when this rule as to *prima facie* proof goes into operation in any case, the burden of proof does not shift from

the educational authorities preferring the charges, and that it merely becomes incumbent upon the accused to come forward with substantial evidence contradicting the facts presumed, i.e., the nature of the organization, and the accused's knowledge thereof. If such evidence is produced by the accused, the presumption dissolves, and the educational authorities must sustain the burden of proving the facts of disqualification under § 12-a of the Civil Service Law by a fair preponderance of the evidence. This was explained by the Court of Appeals in the following language (301 N. Y. at p. 494; Record, p. 67):

"The presumption growing out of a *prima facie* case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely on it."

Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].)"

Moreover, the Court declared (*ibid.*):

"Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above." [Section 12-a, subd. d of the Civil Service Law, providing for judicial review].

The Appellate Division aptly described the manner of operation of this rule of *prima facie* proof, as follows (276 App. Div. at p. 530; Record, pp. 52-53):

"(3) A finding pursuant to the statute (§ 3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under subdivision 2 of section 3022 of the Education Law, namely, that the organization does unlawfully advocate overthrow of the Government and that a member-employee has

knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, moreover, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the Government by force; and (c) that he has knowledge of such advocacy. The disqualification referred to in subdivision (c) of section 12-a, in respect to membership by an employee in a described organization, means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. (Civil Service Law, § 12-a, subd. [d].)"

The provisions of subdivision 2 of § 254 of the Rules of the Board of Regents are an administrative affirmation of the legislative intent, authoritatively explained by the Court of Appeals, that the presumption of disqualification under the Feinberg law by reason of membership in an organization, shall be limited to cases where the teacher retains membership after the listing of the organization. Subdivision 2 of Section 254, so far as here relevant, provides as follows:

"Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith."

3. Independent statutes requiring notice and hearing in proceedings for removal of teachers under the Feinberg Law, § 12-a of the Civil Service Law and § 3021 of the Education Law, and affording judicial or administrative review of such removals.

#### i. Notice and hearing.

The operation of the provisions of the Feinberg law, of § 12-a of the Civil Service Law and of § 3021 of the Education Law can be properly understood only when such statutes are read in the context of other New York laws which provide that teachers having tenure shall not be removed without notice and a hearing, and which guarantee judicial or administrative review of a determination of dismissal. Such protections exist independently of the right to a hearing which is conferred by the Feinberg law even in the absence of tenure, where the presumption thereunder is invoked.

Under the provisions of § 2509,\* subdivisions 2, 3 and 5, § 2573,\*\* subdivisions 4-8, and §§ 3012 and 3013 of the New York State Education Law, no teacher in the public school system who has tenure may be removed except after preferment and service of written charges and a hearing, with full right on the part of the teacher to produce witnesses in his behalf and to cross-examine those who testify against him.

The above-described rights to notice and a hearing in removal proceedings are fully applicable to proceedings to remove a teacher or educational employee under the Feinberg law, or § 12-a of the Civil Service Law, or § 3021 of the Education Law.

The interpretive memorandum of the New York State Commissioner of Education (printed in Appendix A of this brief, pp. 51-55) on the administration of the Board of Regents' Rules promulgated under the Feinberg law, explicitly states that neither that law nor § 12-a of the Civil

\* See McKinney's 1951 Supplement to the Education Law.

\*\* Formerly § 2523; see former § 2523 in main volume of McKinney's Education Law for these subdivisions.

Service Law, nor § 3021 of the Education Law diminishes in any way the independent right of teachers and educational employees to notice and hearing in removal proceedings. The relevant portion of the memorandum reads as follows:

*"3. The preferring of charges.* Neither section 12-a of the Civil Service Law nor section 3021 of the Education Law nor Chapter 360 of the Laws of 1949 modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses, including their accusers, to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal."

## **ii. Judicial or administrative Review.**

Several methods of judicial review, as well as a procedure for administrative review, are guaranteed in the alternative by the New York statutes to a teacher removed under the Feinberg law, or § 12-a of the Civil Service Law, or § 3021 of the Education Law. A teacher deeming himself aggrieved may select his remedy among the following alternative procedures:

(1) Where the removal is predicated on § 12-a of the Civil Service Law, the teacher may obtain a stay of the order of disqualification and judicial review of such order, as specified in subdivision d of that section (see summary of provisions of § 12-a, *supra*, p. 5 of this brief).

(2) Regardless of the ground for removal, the teacher, under § 2509, subdivision 2, § 2573, subdivisions 5, 6 and § 3013, subdivision 4 of the Educa-

tion Law, may at his election obtain judicial review by bringing a proceeding under Article 78 of the Civil Practice Act.

(3) Regardless of the ground for removal, the teacher may elect to appeal to the State Commissioner of Education pursuant to § 310 of the Education Law.

### **The Issues.**

Reduced to their simplest terms, the basic factors underlying the issues presented to the Court by this case are as follows:

A. A state statute (Civil Service Law, § 12-a) requires that no person shall be employed as a teacher in the public schools who (a) holds membership in any organization advocating the overthrow of the government by force or unlawful means and (b) has knowledge of such characteristic of the organization. The constitutionality of such statute is not here attacked and no issue in regard thereto is raised for adjudication by this Court.

B. Another state statute (the Feinberg law) provides that an administrative body shall prepare a list of organizations advocating violent overthrow, after notice to all organizations affected and the holding of hearings. Any such listing is subject to judicial review at the suit of any organization named.

C. Under the terms of the same statute (the Feinberg law), at the hearing (mandated by statute) of removal proceedings brought against a teacher on the ground of membership in a listed organization, proof of membership by the teacher in such organization is *prima facie* evidence of the two elements of disqualification described in item A, *supra*. However, if substantial evidence negating such

elements is presented by the teacher, the presumption dissolves, and the educational authorities must prove both elements by a fair preponderance of the evidence. Any determination of dismissal is subject to judicial or administrative review at the election of the removed teacher.

The issues before this Court are therefore as follows:

1. Does the State statute (the Feinberg law) providing for the listing of violent overthrow organizations and establishing the above-described rule of *prima facie* proof abridge freedom of speech or assembly?
2. Do the provisions of such statute prescribing such rule of *prima facie* proof deny teachers procedural due process?
3. Is such statute (as distinguished from the laws which it implements) so vague in its terms as to deny due process?

## SUMMARY OF ARGUMENT.

### I.

The Feinberg law does not abridge freedom of speech or assembly. No infringement of constitutional rights can be attributed to State legislation which directs that no person shall be employed as a teacher in the public schools who holds membership in an organization advocating overthrow of the government by force or unlawful means, and who knows of such advocacy by the organization.

## I.

The procedures prescribed by the Feinberg law for disqualifying as teachers persons who knowingly hold membership in organizations advocating the overthrow of the government by violence or unlawful means, constitute a fair and reasonable method of ascertaining the facts of disqualification, and do not deny due process of law.

1. Standards for determining compliance with the requirements of procedural due process.
2. Fairness of the Feinberg law procedure as reasonably adapted to meet the problems of investigation and proof inherent in the subject matter involved.
3. Validity of the presumption.
4. The features of the *Garner* case legislation which the concurring and dissenting Justices there deemed constitutionally objectionable are absent from the Feinberg law.

## III.

The Feinberg law is not unconstitutionally vague:

1. The terms of the Feinberg law affecting the rights of those subject to its provisions are clear and unambiguous.
2. It would be inappropriate for this Court to pass upon the constitutionality of § 3021 of the Education Law on this appeal, since the section has not been interpreted by the Court of Appeals.
3. Section 3021 of the Education Law is not unconstitutionally vague.

## ARGUMENT.

### POINT I.

The Feinberg Law does not abridge freedom of speech or assembly. No infringement of constitutional rights can be attributed to state legislation which directs that no person shall be employed as a teacher in the public schools who holds membership in an organization advocating overthrow of the government by force or unlawful means, and who knows of such advocacy by the organization.

#### 1.

The decisions of this Court in *Garner v. Los Angeles Board*, 341 U. S. 716 (1951) and *Gerende v. Election Board*, 341 U. S. 56 (1951), have clearly established the proposition that the provisions of the Federal Constitution which forbid the States to abridge freedom of speech or assembly are not infringed by State or local legislation which disqualifies for or removes from public employment persons who advocate the overthrow of the government by force or unlawful means, or who, knowing that an organization advocates overthrow of the government by such means, hold membership therein.

Thus, no doubt remains that there is nothing in the Federal constitution which compels the people of the State of New York or any other State to hire or retain as teachers of their children, persons who, living in a society where governmental, social and economic change may be accomplished by peaceful persuasion and the democratic processes of the ballot, nevertheless urge, or knowingly hold membership in organizations which urge, that organized destruction of human life, violence and illegal tactics should be used as a means of bringing about changes in the existing form of government or in the present social and economic order. The principle that the Constitution does not confer a right to join conspiracies to overthrow

the government by force has been explained by this Court at length and with unmistakable clarity in *Communication Assn. v. Douds*, 339 U. S. 382 (1949) and *Dennis v. United States*, 341 U. S. 494 (1951).

It is manifest from plaintiffs-appellants' brief that they accept these propositions as established constitutional doctrine (see pp. 5-6, where they concede that § 12-a of the Civil Service Law is "of the character of the charter amendment held valid in the *Garner* case," and p. 9, where the validity of § 12-a is again recognized).

In consequence, their attack on the Feinberg law boils down to a contention that it utilizes unconstitutional procedural methods in order to enforce grounds of disqualification for public service found constitutionally unobjectionable by this Court in the *Garner* and *Gerende* cases.

We propose to demonstrate in Point II that the narrow phraseology and structure of the Feinberg law bring it more clearly within the principles of governmental self-protection enunciated in the *Garner* and *Gerende* cases than the legislation before this Court in those cases, and that the Feinberg law is completely free of the features of the California legislation which prompted the partial and complete dissents in this Court in the *Garner* case. Furthermore, it will be shown in Point II that the Feinberg law, with its ample provisions for notice and hearing, does not raise the problems of due process presented by the procedures of the Federal loyalty program which were upheld in *Bailey v. Richardson*, 341 U. S. 918 (1951).

Plaintiffs-appellants attempt to distinguish this case from the *Garner* case by suggesting in their brief (pp. 8-9, 11) in an oblique and indirect manner that proof of scienter is not required under the Feinberg law, urging that the employee is disqualified not on the basis of personal knowledge, but by being compelled to accept the determination of the Board of Regents as to the nature of the organization. The plausible appearance which has been given this contention does not serve to conceal its speciousness.

As is shown in the analysis of the Feinberg law set forth, *supra*, pp. 10-13, the Court of Appeals, as well as

the Appellate Division, Second Department, has held that there can be no disqualification or removal under the Feinberg law or § 12-a of the Civil Service Law on the grounds of membership in any organization unless (a) it is established by a fair preponderance of the evidence that the member knows that such organization advocates overthrow of the government by force or unlawful means; and (b) the member is given an opportunity at the hearing of his individual case to show that he does not have such knowledge. Although it is scarcely necessary, reference may appropriately be made at this point to the general rule that in passing on the constitutionality of State legislation, this Court considers itself bound by the interpretation given such legislation by the highest State Court. *Winters v. New York*, 333 U. S. 507, 514 (1948).

It has been clearly demonstrated in our analysis of the Feinberg law that no teacher may be removed thereunder from a position in the public school system because of membership in an organization unless the educational authorities, in a hearing accorded such teacher on due notice, prove by a fair preponderance of the evidence the facts of membership, advocacy of violent or illegal overthrow on the part of the organization, and knowledge of such advocacy by the teacher. The issues as to the fairness, reasonableness and constitutionality of the procedures under the Feinberg law whereby such facts may be established by the educational authorities, including the rule of *prima facie* proof—the actual target of plaintiffs-appellants' attack—are discussed in Point II, where we propose to demonstrate that the Feinberg law fully satisfies the constitutional requirements as to procedural due process.

## 2.

We join with plaintiffs-appellants in deprecating invasions of academic freedom and curtailment of the legitimate rights of teachers to freedom of expression and action.

But so long as fair and reasonable procedures are available for ridding the teaching staffs of those who knowingly

become part of a conspiracy to overthrow the government by force, the preservation of intellectual freedom and civil liberties does not necessitate the employment in the public schools of such persons—individuals who have clearly demonstrated by their conduct that they are unfit to teach children in a democratic society.

The Feinberg law does not prevent or discourage teachers from joining any organization which is not engaged in an attempt to convert our democratic form of government into a police state by force or unlawful means. On the contrary, it aids all sincere, well-intentioned teachers in selecting their affiliations, for it furnishes them with a list of organizations found by the State's highest educational body to be of the violent overthrow type under a procedure affording notice, public hearing and judicial review to such organization, and it gives teachers ten days in which to terminate their membership in any listed group.

The defense of democratic institutions demands that they be protected from corruption by totalitarians who would use them to destroy the very freedoms which are invoked by these disciples of force as a justification for their retention in the public service.

This is recognized by leading groups and figures concerned with the protection of civil liberties. The National Education Association, the largest and most widely known association of teachers in America, refuses to admit to or continue in membership persons who are members of organizations advocating governmental change by force or illegal means.\* It has gone on record as indorsing the proposition that membership in a totalitarian organization and in the teaching profession are not reconcilable and that the issue involved is not civil rights but proper qualifications for teaching.\*\*

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\* Amendment to By-laws adopted at 88th Annual Representative Assembly, July 8, 1950.

\*\* Resolution approved at 1949 Representative Assembly of National Education Association.

## POINT II.

The procedures prescribed by the Feinberg Law for disqualifying as teachers in the public schools persons who knowingly hold membership in organizations advocating the overthrow of the government by violence or unlawful means, constitute a fair and reasonable method of ascertaining the facts as to disqualification, and do not deny due process of law.

1. Standards for determining compliance with the requirements of procedural due process.

The concurring opinion of Mr. Justice FRANKFURTER in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), clearly states the tests to be applied in ascertaining whether the requirements of due process are met by the procedures for determining disqualification under the Feinberg law and the related statutes providing for notice, hearing and judicial or administrative review in connection with any determination of disqualification. In discussing the issue as to whether the procedure under the Federal loyalty program for the promulgation of a list of organizations comports with procedural due process, Mr. Justice FRANKFURTER said (pp. 162-163):

"But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.

.....  
 "It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another."

Whether the procedure of the Federal loyalty program there under review duly observed the "rudiments of fair play", declared Mr. Justice FRANKFURTER (p. 163),

"cannot, therefore be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

It must be borne in mind that the organization and administrative structure of New York State's school system are such as to raise practical problems of investigation and proof in connection with the task of determining the fitness of teachers accused of knowingly holding membership in forcible overthrow organizations.

There are about 4,000 school districts in the State of New York which have the duty and responsibility of passing upon the fitness of educational employees, preferring charges against those found disqualified, and conducting hearings on the charges. Many of these school districts have small staffs, few facilities and modest resources, and would therefore find it most difficult, if not impossible, to conduct inquiries into the nature of organizations, in order to determine whether they come within the forcible overthrow category. An attempt by 4,000 school districts of all sizes throughout the State to ascertain on an individual basis the character of numerous organizations would be inevitably attended by endless potentialities for duplication of effort, incompleteness of inquiry, confusion, misunderstanding and needless expenditure of time, effort and money.

The impracticability of imposing upon numerous subordinate governmental units the task of assembling and passing on proof of the nature of forcible overthrow groups, or of requiring such agencies in all instances to present direct proof of advocacy of violent overthrow by such groups at hearings of disciplinary charges against employees, was recognized by Mr. Justice REED in his dissenting opinion in *Anti-Fascist Committee v. McGrath*, 341

U. S. 123 (1951), where he said with reference to the compilation of the Attorney-General's list under the Federal loyalty program (pp. 191-192):

"if legally permissible, as carried out by the Attorney-General, there is no question but that a single investigation as to the character of an organization is preferable to one by each of the more than a hundred agencies of government that are catalogued in the United States Government Organization Manual. To require a determination as to each organization for the administrative hearing of each employee investigated for disloyalty would be impossible."

2. Fairness of the Feinberg Law procedure as reasonably adapted to meet the problems of investigation and proof inherent in the subject-matter involved.

The procedural provisions of the Feinberg law represent a fair and practical solution to the problem of equipping a loyalty program with a machinery of adjudication which will function in a just and equitable manner, with due consideration for the interests of the public and the rights of the personnel affected.

The task of ascertaining in the first instance the nature of organizations is entrusted to the Board of Regents, the most important and responsible body in the State educational system. The Board, which heads all educational activities of the State and determines educational policies, is composed of distinguished and outstanding citizens chosen for their capacity to perform these important civic functions. As has been shown *supra* (pp. 8-10), the Feinberg law requires that before the Board may make a determination as to the nature of any organization, notice and a hearing must be given the organization. Moreover, judicial review of the Board's determination is available to the organization (*id.*, p. 10).

In prescribing the effect of such determination at individual disciplinary trials, the Feinberg law follows a rule of reason and common sense which fully protects the rights of the accused teacher. Any teacher who retains member-

ship in an organization on or after the tenth day subsequent to the promulgation by the Board of a list specifying that such organization advocates forcible overthrow, becomes subject to the rule that if charges are preferred against him, membership in the organization constitutes *prima facie* evidence of such advocacy by the group and of the member's knowledge thereof (*supra*, pp. 10-13). Evidence of past membership in the group is presumptive evidence that membership has continued, in the absence of a showing that membership has been terminated in good faith (*supra*, p. 13). It is apparent that this is merely a restatement of the long-established common law presumption of continuance.

The listing of the group does not conclude an accused teacher as to its nature or as to his knowledge thereof (*supra*, pp. 10-13), but merely creates a rebuttable presumption. If he presents substantial contradictory evidence, the educational authorities have the burden of proving the nature of the group and his knowledge thereof by a fair preponderance of the evidence (*ibid.*). Similarly where it is presumed from past membership that a teacher has continued his membership after the listing of the organization, the presumption dissolves and the educational authorities have the burden of establishing continued membership by actual proof, if the teacher presents substantial evidence that he terminated his membership in good faith (*supra*, pp. 11-13). Moreover, a full right of judicial review or administrative appeal to the State Commissioner of Education is guaranteed to any teacher found disqualified (*supra*, pp. 15-16).

One of the yardsticks of procedural due process referred to by Mr. Justice FRANKFURTER (*supra*, p. 24) is the existence of "available alternatives to the procedure that was followed." We submit that the Feinberg law procedures represent the only feasible, practical solution to the problems of adjudication involved.

It has already been shown that any plan requiring the school districts of the State to ascertain separately the organizations which advocate forcible overthrow would

be administratively unworkable. If the task is entrusted to a single responsible agency, how may its findings be effectively utilized in individual disciplinary cases if they are not made at least *prima facie* evidence therein?

It is apparent that the preparation of a list of organizations by the Board of Regents under the Feinberg law affords teachers protections and benefits which they would not otherwise enjoy.

Under the Feinberg law procedure, any organization under inquiry receives notice and a public hearing and both its membership and the public are apprised of the accusation that it advocates forcible overthrow. Members of the group may study the evidence presented by the Board of Regents in the hearing, and assist the organization in its presentation of evidence offered in rebuttal. Should the organization exercise its right to test an adverse ruling by the Board of Regents in the Courts by means of an Article 78 proceeding, the organization may also apply to the New York courts for a stay of the disqualifying effects of the listing pending a final judicial adjudication of the issues (New York Civil Practice Act, § 1299).

If any member of a listed group, after considering the evidence produced against it, after the final decision of the courts in any suit brought by the organization to test the issue, and after consideration of the matter during the waiting period prior to the date when a listing becomes effective for purposes of disqualification, still holds the view that the organization's activities are lawful, and retains his membership therein, he may contest the issue as to the nature of the organization in his individual disciplinary hearing. If he there presents substantial evidence contradicting the findings of the Board of Regents, the educational authorities preferring the charges are required to prove the unlawful nature of the organization by a fair preponderance of the evidence.

The argument that the Feinberg law presumption casts upon the teacher an unfair burden of going forward with evidence as to the nature of the organization is manifestly groundless. The procedure under that law gives the

teacher or his attorney the advantage of an opportunity for detailed and deliberate study of the evidence against the organization (a public record pursuant to Public Officers Law, § 66) in advance of the teacher's hearing, so that he is in a far more favorable position to prepare for trial on this issue than he would be if the Feinberg law were not on the statute books.

Moreover, after a full administrative hearing, the teacher may again litigate the issue in the courts by means of judicial proceedings for the review of any determination of disqualification by the educational officials, or he may further litigate the question administratively by appeal to the Commissioner of Education (see analysis *supra*, pp. 15-16 of this brief).

We submit that it would be difficult to conceive of a workable procedure more scrupulously fair to the public employee.

In this connection, it should be noted that in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951), Mr. Justice JACKSON spoke of the Federal loyalty program procedure as follows in his concurring opinion (p. 186):

"There are two stages at which administrative hearings could protect individuals' legal rights—one is before an organization is designated as subversive, the other is when the individual, because of membership, is accused of disloyalty. Either choice might be a permissible solution of a difficult problem inherent in such an extensive program."

The Feinberg law and the related statutes guarantee notice, hearing and judicial review *both* to the organization and to its teacher members.

### 3. Validity of the presumption.

Plaintiffs-appellants' attack on the rule of *prima facie* proof prescribed by the Feinberg law combines a misconception of the nature of the presumption raised and a distortion of the common facts of experience.

The presumption flowing from membership in an organization applies to two elements of proof: (1) advocacy of

violent or illegal overthrow by the organization; (2) knowledge of such advocacy by the member.

As to the first element, the nature of the organization, the Feinberg law merely provides that the findings of an administrative body after notice and hearing shall be *prima facie* evidence—or in other words—shall create a rebuttable presumption, at the hearing of disciplinary proceedings brought against a member of the organization. It has long been recognized by this Court that where definite and specific property rights are involved, no valid objection can be made on due process grounds to a statute which makes the findings of an administrative body or official *prima facie* proof in other proceedings wherein the party against whom the presumption operates is free to rebut it with evidence.

In *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412 (1915), this Court upheld as constitutional a statutory provision making the findings and report of the Interstate Commerce Commission *prima facie* evidence of the facts therein stated in any action by a shipper against a carrier to recover damages for the charging of unreasonable or unjustly discriminatory rates, as determined by the Commission with respect to such shipper after prior investigation and hearing. At the trial of plaintiff shipper's action against a carrier, the plaintiff offered no evidence as to unjust discrimination, exaction of unreasonable rates, or damages sustained, but relied on the findings of the Commission as proof of these matters. In sustaining a recovery by the plaintiff shipper and in rejecting the contention of the defendant carrier that the statutory rule of *prima facie* proof denied due process, the Court said (p. 430):

"It is also urged, as it was in the Courts below, that the provision in § 16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law."

In *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U. S. 440 (1916), a riparian owner attacked the constitutionality of an Oregon statute providing for the preliminary determination of claims to water rights by an administrative board, subject to final confirmation by court decree. The statute provided that in connection with proceedings before the board, the State Engineer or a qualified assistant should measure the flow of the stream involved, determine other pertinent facts, and make a report thereon which became a public record. Under the provisions of the statute, such report was accepted as *prima facie* evidence by the board. In rejecting the contention that this provision of the statute denied due process, the Court said (pp. 453-454):

"And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all and is accepted as *prima facie* evidence, but not as conclusive. . . . Considering the nature of the report and that claimants may oppose it with other evidence, it is plain that its use as evidence is not violation of due process. *Meeker v. Lehigh Valley R.R.*, 236 U. S. 412, 430."

Thus this Court held that where property rights are involved, there is no constitutional bar to a process of administrative adjudication in which independent findings of a public officer, based on his own investigation and made

without hearings, are accepted as *prima facie* proof, so long as such findings are made a public record and an opportunity is afforded to rebut them before the administrative tribunal which accepts them as presumptively true. There is therefore no occasion for discussing the question as to whether a test less strict than that laid down in the *Meeker* and *Pacific Live Stock* cases may be applied with respect to disqualification of persons for employment in the civil service of a State, in view of the absence of any constitutional right to public employment (*Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 182-183, 185 [1951]; *Garner v. Los Angeles Board*, 341 U. S. 716, 724 [1951]).

The transcript of the evidence taken at the public hearing by the Board of Regents with respect to a listed organization is a public record (New York Public Officers Law, § 66), and is available for inspection by any teacher against whom charges are preferred pursuant to the Feinberg law, or his attorney. In this respect, the Feinberg law provides greater protections than were held sufficient to meet the requirements of procedural due process in the *Pacific Live Stock* case. There no opportunity was afforded to examine a written record of the evidence on which the Engineer's report was based.

As to the phase of the Feinberg law presumption making the listing of an organization *prima facie* proof of its advocacy of violent or illegal overthrow, the cases invalidating statutory presumptions cited in plaintiffs-appellants' brief (p. 9) are not in point. None of those cases dealt with a presumption based on findings of an administrative body or official.

The Feinberg law presumption of knowledge of the nature of an organization from proof of membership therein does not in any way violate the rule that there must be a reasonable relation between a fact presumed pursuant to statute and the proven fact activating the presumption.

It is a matter of common human experience that when persons with the educational attainment required of teachers belong to an organization, they are aware of its purposes and activities. But in the case of the presump-

tion under discussion, there are added circumstances which provide every reasonable basis for making a *prima facie* inference of knowledge from membership.

The Feinberg law requires the Board of Regents, after a hearing necessarily attended by wide publicity, to determine on all the evidence presented whether any organization under inquiry advocates violent or illegal overthrow of the government. If the determination is adverse to the organization, its members have ten days after the official publication of the finding in which to become apprised of the Board's ruling. Any such event would unquestionably be publicized extensively throughout the school system and in the community at large by means of the press and other media of information.

It is manifest that the members of the organization, as well as the general public, could scarcely escape learning of its listing by the Board of Regents. Moreover, since the evidence against the organization is a public record, and would inevitably be widely reported and publicized, such evidence would become a matter of common knowledge. To presume knowledge of an organization's nature under such circumstances is merely to give *prima facie* recognition to an obvious fact.

Thus the real issue is not whether there is a reasonable basis for presuming knowledge, but whether the determination of the Board of Regents as to the nature of the organization is correct. Since a member of a listed organization, in his individual disciplinary hearing, may contest both the nature of the organization and his knowledge thereof by presenting substantial contrary evidence, and thus require the educational authorities to prove both of these elements of disqualification by a fair preponderance of the evidence, the objection to the presumption of knowledge is reduced upon analysis to a barren technical quibble. A teacher mistakenly accused of membership could adequately prepare to contest the nature of a listed organization, if he should elect to do this, by examining the transcript of the evidence in relation to such organization in advance of his disciplinary trial.

A final observation on this point seems appropriate. The presumption that a teacher knows the program and activities of organizations to which he belongs merely gives the members of the teaching profession credit for possessing the degree of discernment and understanding requisite for their calling.

4. The features of the *Garner* case legislation which the concurring and dissenting Justices there deemed constitutionally objectionable are absent from the **Feinberg Law**.

The Feinberg Law does not operate retrospectively. It provides for disqualification of teachers only on the basis of conduct knowingly engaged in, which must be proven by evidence at a hearing, with full right of judicial or administrative review. No question of bill of attainder, *ex post facto* legislation, or disqualification for past acts is therefore involved in this case.

### POINT III.

**The Feinberg Law is not unconstitutionally vague.**

1. The terms of the Feinberg law affecting the rights of those subject to its provisions are clear and unambiguous.

By plucking the word "subversive" out of the context in which it appears in the preamble of the Feinberg law, in the Regents' rules and in the Commissioner's interpretive Memorandum, plaintiffs-appellants seek to create the impression that the Feinberg law makes the term "subversive" a standard for disqualifying teachers. It is patent that this law does not lend itself to such an interpretation.

The unfounded charge of vagueness can best be answered by pointing out that the Feinberg law nowhere makes "subversive" doctrines or "subversive" conduct a ground for listing an organization or for disqualifying a

teacher. It has been already demonstrated that the preamble of the Feinberg law is not a part of the operational provisions of the law, was not codified as a part of the Education Law, and does not prescribe grounds for disqualification (see analysis, *supra*, pp. 7-8 of this brief). The term "subversive" is used in the operational portions of the law only once and then as a designation for organizations which "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means \* \* \*" (Education Law, § 3022, subdivision 2). The Regents' Rules and Commissioner's Memorandum nowhere provide for the disqualification of teachers for any cause other than the specific grounds set forth in the operational portions of the law. The Court of Appeals carefully considered the contention that the Feinberg law is vague and unhesitatingly rejected this argument (301 N. Y. at pp. 493-494; Record, pp. 66-67).

2. **It would be inappropriate for this Court to pass upon the constitutionality of § 3021 of the Education Law on this appeal, since this section has not been interpreted by the Court of Appeals.**

Section 3021 of the Education Law, which is implemented by the Feinberg law and which provides for the removal of teachers guilty of treasonable or seditious acts or utterances, is quoted in the opinion of the Court of Appeals in this case (301 N. Y. at p. 485; Record p. 56-57), but is not interpreted or otherwise discussed therein. The opinion of the Appellate Division herein and the opinion of the Supreme Court at Special Term do not construe or discuss § 3021. It is unnecessary in this connection to speculate concerning the views as to issues for decision, or other motivating considerations, which impelled these Courts to omit any discussion of § 3021 from their opinions, in view of the fact that the plaintiffs do not allege in their com-

plaint or otherwise show that the educational authorities are proceeding or are about to proceed against them or any other persons for their removal under § 3021. It suffices to point out that neither the Court of Appeals nor the Appellate Divisions have ever construed this section and that it has therefore never been authoritatively interpreted.

We submit that in view of the absence of an adjudication of the meaning of § 3021 by the Court of Appeals, and in the light of the authoritative precedents of this Court dealing with such situations, it would be inappropriate for this Court to pass on the constitutionality of this section on this appeal.

It has been repeatedly held by this Court that where a constitutional issue involving the interpretation of a State statute is raised before it and such statute has not been decisively construed by the State courts, the Supreme Court will refrain from passing on such constitutional issue until the statute has been authoritatively construed by State judicial decision. *Federation of Labor v. McAdory*, 325 U. S. 450, 460-462, 470-471 (1945); *Asbury Hospital v. Cass County*, 326 U. S. 207, 213-216 (1945); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546 (1914); *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 368-371 (1914); *Aero Transit Co. v. Georgia Comm'n*, 295 U. S. 285, 293-294 (1935); *Minnesota v. Probate Court*, 309 U. S. 270, 276-277 (1940); Cf. *Utah Power & L. Co. v. Pfof*, 286 U. S. 165, 186-187 (1932); *Stephenson v. Binford*, 287 U. S. 251, 276-277 (1932).

In *Federation of Labor v. McAdory*, *supra*, wherein certain labor unions brought an action in the Alabama Courts for a declaratory judgment establishing the unconstitutionality of an Alabama statute regulating labor unions, this Court unanimously refused to pass upon the constitutionality of certain provisions of the act which were attacked as void for vagueness. The ground for this ruling was that such provisions had not been authoritatively construed by the State courts and that no application of the statute to a specific set of circumstances was involved.

The highest State court had sustained the statute although the contention of indefiniteness had been urged before it. In this connection, this Court said (p. 470):

"The objection that §§ 7 and 16 of the state statute are too vague and uncertain to meet constitutional requirements is one which cannot appropriately be considered in a declaratory judgment proceeding in the federal courts, in advance of their authoritative construction by a state court. As we have said, it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions."

Further explaining its rule of abstention, this Court declared (p. 471):

"The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the court. \* \* \*. It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts."

Moreover, the Court observed (*ibid.*):

"In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes."

Should this Court now undertake to pass upon the validity of the section, there would be no prior oppor-

tunity for the New York courts to expound its meaning and thus obviate possible constitutional objections which might otherwise be advanced against the statute. See for example, *Fox v. Washington*, 236 U. S. 273 (1915), wherein the construction given a penal statute by the highest State court was held to overcome the objection of vagueness. Cf. *Winters v. New York*, 333 U. S. 507 (1948).

The persuasive force of this consideration was strongly expressed in the *McAdory* case in the following language (325 U. S. at pp. 470-471):

"State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. \* \* \* In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. \* \* \* Such is not the function of the declaratory judgment."

We submit that since the instant action is a suit for a declaratory judgment involving no application of the Feinberg law or the statutes thereby implemented to any specific state of facts, the holding and reasoning of the *McAdory* case are controlling and demonstrate that the validity of § 3021 should not be adjudicated on this appeal.

### 3. § 3021 of the Education Law is not unconstitutionally vague.

The language of § 3021 of the Education Law\* is sufficiently definite to meet any constitutional test of certainty which may be applied to a statute prescribing qualifications of fitness for teachers in public schools. It is clear from an analysis of the provisions of this statute that it provides for disqualification on the ground of commission of the specifically defined crime of treason, commission of expressly defined crimes and specific acts engendering public disorder which come within the legal definition of the term "sedition", and the making of utterances comprehended within the foregoing types of misconduct.

The terms "treason" and "sedition" have been clearly defined by legislation, judicial precedents and lexicographical authorities which plaintiffs-appellants have ignored in advancing their contention of vagueness.

#### A.

The Federal crime of treason is defined in Article III, § 3 of the United States Constitution and in 18 U. S. C. § 2381.\*\* The crime of treason against the State of New York is defined in § 2380 of the Penal Law.

#### B.

The meaning of the term "sedition" in legal parlance is well settled. The essence of seditious conduct, as recognized by all legal definitions, is a deliberate attempt to create and use public disorder or conditions of violence as

\* § 3021 (formerly § 568) was added to the Education Law by New York Laws of 1917, Chapter 416, which likewise added similar provisions to the Civil Service Law (§ 23-a) and to the Public Officers Law (§ 35-a). Chapter 416 was thus made applicable to all persons in the civil service of the State and its political subdivisions. The obvious purpose of the Act was to protect the war effort by removing from the public service persons found unfit by reason of their commission of acts embraced within the scope of the terms "treason" and "sedition".

\*\* See the Proclamation promulgated by the President on April 16, 1917, wherein he specified various kinds of acts which have been held to be treasonable by the courts of the United States (set forth after 18 U.S.C.A. § 2381).

a means of overthrowing or opposing lawful agencies and institutions of government.

In *Black's Law Dictionary* (De Luxe Ed.) "sedition" is defined as follows:

"Sedition. An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state."

In *Arizona Pub. Co. v. Harris*, 20 Ariz. 446, 181 Pac. 373 (Sup. Ct., Ariz., 1919), the following definition was given (181 Pac. at p. 375):

" 'Sedition' has been defined to be:

'The raising of commotions and disturbances in the state; it is a revolt against legitimate authority.' 3 Bouvier's Law Dictionary, p. 3033 (Sedition)."

The Court declared that to publish of a public official that he made seditious reports

"is to charge him with the raising of commotions and disturbances in the state, and with being a destroyer of public tranquillity—guilty of acts tending to the breach of public order and safety." (181 Pac. at p. 376).

A similar meaning was assigned to the word seditious in *Wilkes v. Shields*, 62 Minn. 426, 64 N W 921 (Sup. Ct. Minn., 1895).

There are a number of specifically defined crimes which come within the scope of the term sedition. The Federal crime of seditious conspiracy, which includes conspiracies to overthrow or resist the Federal government by force, is defined in 18 U. S. C. § 2384. Section 161 of the New York State Penal Law makes it unlawful for any person to advocate the overthrow of the government by force or violence or by unlawful means, orally or in writing, and

likewise makes it a crime to organize or become a member of a group which advocates such doctrine.\*

Persons who wilfully advocate the overthrow of the government by force, or who, with intent to cause such overthrow, organize a group of individuals who advocate the use of force for such purpose, or who become members of such a group, knowing its purposes, are guilty of a Federal crime under 18 U. S. C. § 2385.\*\*

Regardless of whether given conduct of a teacher falls within the prohibitions of the above-cited statutes, if such conduct is embraced within the legal definition of sedition as stated by the courts and legal lexicographers, it necessarily demonstrates unfitness to hold employment in the public schools. It is undeniable that any person who deliberately attempts to use, create or incite violence or public disorder in this country as a means of effecting governmental change, or of opposing or obstructing the lawful processes or functions of government, does not possess the character qualifications requisite for proper performance of the duties of a teacher.

It must be borne in mind that § 3021 of the Education Law is not a criminal statute, but one which deals with the fitness and competency of persons holding positions in a most important and sensitive branch of the public service. Its phraseology is sufficiently definite to give fair notice of the prohibited conduct to any person who holds a position in the school system. Cf. *Communications Assn. v. Douds*, 339 U. S. 382, 412-413 (1950); *Dennis v. U. S.*, 341 U. S. 494, 515-516 (1951). It is submitted that the term "sedition" is no more subject to attack on the ground of vagueness than the term "crime involving moral turpitude", which was upheld by this Court as a sufficiently definite standard for deportation proceedings in *Jordan v. De George*, 341 U. S. 223, 229-232 (1951).

\* In *Gilow v. New York*, 268 U.S. 652 (1925), this Court upheld the constitutionality of the provisions of this statute under which one who published matter urging forcible overthrow was convicted.

\*\* In *Dennis v. U.S.*, 341 U.S. 494 (1951), this Court sustained the constitutionality of the provisions of this statute under which the defendants were indicted for conspiracy to organize such a group and to advocate the overthrow of the government by force.

## C.

Even if § 3021 should be stricken down, the Feinberg law would remain unimpaired as an independent, efficacious instrument for the enforcement of § 12-a of the Civil Service Law. In such event, this Court would have jurisdiction to rule that the Feinberg law would remain valid and operative to that extent. *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 274 (1936); *Liggett Co. v. Lee*, 288 U. S. 517, 541 (1933). And in view of the obvious capacity of the Feinberg law to function effectively and carry out its purpose independently of § 3021, such a ruling would be both appropriate and in the interests of justice.

### CONCLUSION.

The Feinberg law, the Rules issued thereunder and the statutes which it implements establish reasonable and constitutionally unobjectionable standards and procedures for the preservation of the integrity and competency of the teaching staffs of the public schools. Laws establishing similar standards of fitness and more stringent procedures have been already pronounced constitutional by this Court. No invasion of academic freedom and no infringement of civil liberties results from the legislation challenged. Rather does it constitute a bulwark against totalitarian corruption of the public schools—educational institutions which occupy a key position in the structure of a democratic society.

**The judgment of the New York Court of Appeals should be affirmed.**

New York, December 21, 1951.

Respectfully submitted,

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**APPENDIX A.****CHAPTER 360, LAWS OF 1949 (THE FEINBERG LAW)**

Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens

dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby re-numbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine

that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

3022. Elimination of subversive persons from the public school system.

3023. Liability of a board of education, trustee or trustees.

3024. Teachers responsible for record books.

3025. Verification of school registers.

§ 5. This act shall take effect July first, nineteen hundred forty-nine.

### EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

### CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) Prints, publishes, edits, issues or sells, any books, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or ad-

vocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

# RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

## CHAPTER XV-B

### SUBVERSIVE ACTIVITIES

*Section 254 - Disqualification or removal of superintendents, teachers and other employees.*

1 The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employees who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance

with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2 Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the

Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3 On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also in-

clude, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4 Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

5 This section shall take effect immediately.

# COMMISSIONER'S MEMORANDUM

ON

## ADMINISTRATION OF REGENT'S RULES RELATING TO SUBVERSIVE ACTIVITIES

Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employes as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect, simply of directing attention to a special supervisory need—namely, the need “to protect the children in our state from . . . subversive influence”—which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need.

The Rules established by the Regents in response to the direction of the Legislature are largely self-explanatory. The Rules provide systematic procedures for identifying and removing from the school system disloyal teachers or other employes.

On four major points certain supplementary comments may be appropriate. These points are (1) the responsibility of the officials designated by school authorities for reporting on teachers and other employes, (2) the types of conduct which may properly be considered by school authorities as subversive within the meaning of section 3021 of the Education Law and section 12-a of the Civil Service Law, (3) the rights of a person accused of subversive activity to a hearing on charges, and (4) the listing of organizations found by the Regents to be subversive within the meaning of the law.

1 *Reports by school officials.* The officials designated by school authorities to report on teachers and other employes will face a two-fold duty. It will be their respon-

sibility, on the one hand, to help the school authorities rid the school system of persons who "use their office or position to advocate and teach subversive doctrines." On the other hand, it will be their responsibility so to conduct themselves and their inquiries as to protect and reassure teachers who are not subversive.

School authorities will need to select with great care the officials who are to be entrusted with this duty.\* The officials chosen should be persons of wide acquaintance within the school system, sound judgment in matters of personal relationships, and sufficient maturity and professional experience to have won the respect of the other local officials, teachers and school employes and of the general public. Furthermore, these officials must be close enough to the work of the classroom teacher so that they will have a real understanding of the methods of presentation that may make the difference between teaching which is subversive in intent and teaching which has neither a subversive purpose nor subversive results.

In preparing the reports which they are to render to the school authorities, the designated officials will of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence. In weighing such further evidence the officials should be guided by the considerations presented in section 2 of this memorandum. Any evidence submitted to such officials which reflects adversely on a teacher, they are bound to examine promptly, dispassionately and thoroughly.

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\* School authorities in districts employing fewer than eight teachers will ordinarily find it advantageous to designate one or more of their own number as the official or officials to make the required reports. When there is only a single trustee in such a district, he or she will presumably make all the reports required by the Regents' Rules.

The Designated officials should bear in mind for their own guidance, and where appropriate should bring to the attention of others, the fact that while statements made in connection with an official charge of disloyalty are legally privileged, no privilege attaches to gossip and the circulation of rumor. In this latter connection attention is called to the *Matter of Mencher v. Chesney*, 297 N. Y. 94 (101) in which the Court of Appeals stated: "The courts have held that a false charge that one is a Communist is basis for a libel action."

**2 Subversive activity.** The Education Law and the Civil Service Law make it entirely clear that a teacher or other employe who "wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means," or who participates in the preparation, publication or distribution of written or printed matter advocating such a doctrine or advising its adoption, or who "organizes or helps to organize or becomes a member of any society or group of persons" which teaches or advocates such a doctrine, or who utters "any treasonable or seditious word or words" or does "any treasonable or seditious act or acts," is engaging in subversive activity and is subject to dismissal. It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subversive acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children.

It must be borne in mind that teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American

form of government and American institutions, which can not in any just sense be construed as subversive. Especially if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and foreign governments (including the people and government of Russia), not for the purpose of advocating changes in our own government but for the purpose of acquainting their pupils with the kinds of government under which other peoples live.

Moreover, teachers who take full advantage of their own privileges as citizens may raise questions and make suggestions outside their classrooms, about improvements in our form of government. In addition, they may quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own.

School authorities and the officials designated in accordance with the Regents' Rules must be alert to guard such teachers against unjust accusation and condemnation. In particular, they should reject hearsay statements, or irresponsible and uncorroborated statements, about what a teacher has said or done, either in school or outside. They should examine an accused teacher's statements, writing or action in their context, and not in isolated fragments. They must insist on evidence, and not mere opinion, as a basis for any action which they may take.

But the statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case.

\*3 *The preferring of charges.* Neither section 12-a of the Civil Service Law nor section 3021 of the Education Law nor Chapter 360 of the Laws of 1949 modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal.

4 *List of subversive organizations.* The Regents have not as yet published a list of organizations which, in accordance with Chapter 360 of the Laws of 1947, they have found to be subversive in that the said organizations "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine." Due notice will be given to school authorities of the publication of the required list. Pending its publication, school authorities are responsible for proceeding with all diligence in the cases of teachers whose acts other than membership in specified organizations fall within the purview of the statutes. They are not responsible until the list is published, for proceeding against teachers on the ground that they belong to any specified organization.

In the reports required as of October 31st, school authorities will be expected to indicate the measures which they have put into effect prior, as well as subsequent, to the publication of the Regents' list.

FRANCIS T. SPAULDING  
Commissioner of Education